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9   UNITED STATES DISTRICT COURT

10   FOR THE DISTRICT OF MASSACHUSETTS

11

   UNITED STATES OF AMERICA,   )
12   )
)
13   Plaintiff,   )   No. 8354-WMB
)
14   vs.   )
)   AFFIDAVIT OF ABRAM CHAYES
15 DANIEL ELLSBERG,   )
)
16   Defendant.   )
   ------------------------------------)

17

18 STATE OF MASSACHUSETTS)
) SS
19 COUNTY OF MIDDLESEX   )

20   Abram Chayes, being first duly sworn, deposes and says:

21   1. My name is Abraham Chayes. I live at 3 Hubbard Park,

22 Cambridge, Massachusetts 02138. I am presently employed as

23 Professor of Law at Harvard Law School, teaching courses in

24 Civil Procedure and International Law.

25   2. My professional experience includes: 1949-50, legal

26 adviser to Governor Chester Bowles of Connecticut; 1951-52, law

27 clerk to Justice Felix Frankfurter, United States Supreme Court;

28 1952-55, associate, Covington & Burling, Washington, D.C.;

29 1955-60, Associate Professor and then Professor of Law, Harvard

30 Law School; 1964-65, of counsel, Ginsburg & Feldman, Washington, D.C.

31   3. From January 1961 to June 1964 I held the office of

32 Legal Adviser to the United States Department of State.

4. The Legal Adviser is appointed by the President with the advice and consent of the Senate and has the statutory rank of Assistant Secretary of State. He has general responsibility for the legal work of the Department in the fields of both international and domestic law. He supervises an office of some 60 lawyers. His responsibilities are comparable to those of the General Counsel of other Cabinet departments.

5. On a number of occasions during my tenure, I was officially consulted about the scope of Title 18 U.S.C. Sec. 793, in connection with incidents of unauthorized disclosure to newspapers of information classified under Executive Order 10501. In each case, I responded to the effect that criminal liability under that section could not be established without a showing of specific intent to injure the United States or to aid a foreign power; that the circumstances of publication in the particular case made such proof unlikely; and that absent such intent, the only recourse was to administrative penalties within the Department. To the best of my recollection, one or more of these opinions was delivered in writing.

6. On one occasion I was consulted with respect to the enforcement of the undertaking in the Security Termination Statement signed by officers or employees upon leaving the government service to the effect that the employee had surrendered all classified information in his custody and would not knowingly or willfully communicate, deliver or transmit classified information to an unauthorized person or agency. The question was whether this undertaking could be enforced by criminal penalties. I advised that absent conduct accompanied by the specific intent required for conviction under §793 or amounting independently to a violation of some other provision of the Criminal Code, criminal enforcement of this undertaking was

not available. To the best of my knowledge, this opinion
was delivered in writing.

7. Although these opinions represented my independent
legal judgment, they were prepared in consultation with
responsibile attorneys in the Office of the Legal Adviser
and, in some cases, after consultation with the Department
of Justice. It was my understanding that this interpretation
represented the consistent and unbroken view of both Depart-
ments as to the scope of the statute involved.

8. Written opinions of the kind mentioned herein would
not ordinarily be classified in the Department of State and
would as a usual practice be preserved among the permanent
records of the Department.

_____
Abram Chayes

Subscribed and sworn to me this   day of October, 1971.

_____
NOTARY PUBLIC